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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE TIMES MIRROR COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE TIMES MIRROR COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER FEDERAL COMMUNICATIONS COMMISSION

INTEREST OF AMICUS CURIAE [1]

The Times Mirror Company ("Times Mirror"), through its subsidiary The Times Herald Printing Company, publishes *The Dallas Times-Herald*, a daily news-

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[1] Pursuant to Rule 42(2) of the Rules of this Court, Times Mirror has obtained the written consent of all the parties to the case to its filing of this brief as *amicus curiae*. The written consents are on file with the Clerk of this Court.

paper of general circulation in Dallas, Texas.[2] Times Mirror also owns all the outstanding stock of KDFW-TV, Inc., licensee of station KDFW-TV, one of six television stations serving the Dallas-Fort Worth area.[3]

In 1975 the Federal Communications Commission (the "Commission") adopted rules forbidding the issuance of new licenses for broadcast stations (either television or radio) to the owner of a daily newspaper of general circulation located in the same community as the broadcast station. The Commission determined not to apply the cross-ownership ban retroactively to existing co-located combinations, except in small markets in which one owner had virtually an absolute monopoly of communications voices. The decision of the court of appeals under review herein upheld the prospective portion of the rules but invalidated the Commission's decision not to apply the cross-ownership ban retroactively.

If permitted to stand, the court of appeals' decision will have a substantial adverse effect on Times Mirror by forcing it to divest either its newspaper or its broadcast station in Dallas-Fort Worth, unless it could obtain a waiver of the rule from the Commission upon a showing of special circumstances.[4] The Commission rule would

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[2] The *Times Herald* competes in the Dallas-Ft. Worth area with the other daily Dallas metropolitan newspaper, *The Dallas Morning News*, with the *Ft. Worth Star-Telegram*, and with a number of suburban newspapers.

[3] KDFW-TV competes with four other commercial television stations. Two of these are network affiliated VHF stations, one is an independent VHF station, and one is an independent UHF station. Dallas-Ft. Worth also is served by a noncommercial VHF station.

[4] The waiver standard adopted by the Commission (J.A. 211-12, ¶ 119), and approved by the court of appeals (J.A. 431 n. 112), is very strict, particularly as applied to a large market such as Dallas-Fort Worth. While a temporary inability to sell the newspaper or the station in an orderly market might justify a short duration

have permitted Times Mirror to retain both its Dallas-Fort Worth newspaper and television station, so long as the station continued to serve the public interest.

As the parties to this litigation have demonstrated, the court of appeals' decision would require a massive rearrangement of the pattern of ownership of this country's newspapers and television stations, especially in major metropolitan areas. This brief limits its discussion to two fundamental errors in that decision, each of which requires reversal of the judgment below:

First, the court of appeals transgressed the proper limits of the judicial role in reviewing agency action, by substituting its own balancing of the public interest for that of the Commission on the question whether divestiture of existing cross-ownerships of newspapers and broadcast stations should be required in communities which already have diversity in communications voices.

Second, even assuming there were no rational basis for the Commission's decision not to require general divestiture, the court of appeals erred nonetheless in ordering the Commission on remand to adopt a comprehensive divestiture rule, without allowing the Commission to exercise the normal discretion of an administrative agency to make a new determination in light of the court's decision.

STATEMENT

The Commission's Decision

The Commission has long been concerned that over-concentration of ownership of mass communications media

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waiver, a permanent waiver will be granted only in very limited circumstances, if the owner can show that the community cannot support separate ownership and operation of the newspaper and the station, or that presentation of diverse views to the community would be better served by continuation of the present combination. J.A. 211-12, ¶ 119.

might adversely affect the public's interest in receiving information from "diverse and antagonistic sources." *See Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). As the broadcast industry has matured and the Commission has acquired expertise in its regulation, the Commission has moved steadily to attempt to reduce concentration by general rules, in the hope that diversification of ownership will stimulate presentation of a variety of views. The process has been gradual and evolutionary, with new restrictions imposed on a step-by-step basis.

As early as 1941, the Commission enacted regulations which prohibited any organization from operating more than one broadcast network. *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 207-08 (1943). It also prohibited any person from controlling two or more stations of the same class (AM or FM) in the same service area. J.A. 193-94, ¶ 105. *See* 1945 FCC Annual Report at 2. In 1953, the Commission adopted a rule which limited the number of radio and television operating licenses which any one licensee could hold. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). And in 1964, the Commission adopted policies designed to prohibit overlapping service contours and regulate concentration of ownership in the top 50 markets.[5]

In keeping with this evolutionary process, the Commission in 1968 announced proposed rules proscribing common ownership of broadcast stations providing different broadcasting services (TV-AM, TV-FM or AM-FM) in the same market (J.A. 135, ¶ 2). In 1970, the Commission adopted final rules (modified in 1971) which

[5] Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501 (1968).

prospectively prohibited common ownership of VHF television stations and any radio stations in the same market, permitted common ownership of AM-FM stations, and provided that applications involving common ownership of UHF television stations and radio stations would be considered on a case-by-case basis. Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, *as modified*, 28 F.C.C. 2d 622 (1971) (J.A. 135-36, ¶ 3). The rules did not require divestiture of existing combinations but provided that the owner of a VHF station and a radio station in the same community could not thereafter sell both stations to the same person (*id.*). Simultaneously, the Commission published a *Further Notice of Proposed Rulemaking*, 22 F.C.C.2d 339, which invited public comments on a proposal, *inter alia*, to require divestiture, within five years, to reduce any one person's holdings in any market to one or more daily newspapers or one television broadcast station (J.A. 136, ¶ 4). The ensuing rulemaking led to this litigation.

This proceeding was not the Commission's first inquiry into the potential problems of newspaper and broadcast station cross-ownership. In the 1940s, the Commission conducted a thorough investigation of the field and decided to control cross-ownership questions on a case-by-case basis rather than by regulation. Orders No. 79 & 79-A, 6 Fed. Reg. 1580, 3302 (1940); Newspaper Ownership of Radio Stations (Notice of Dismissal of Proceedings), 9 Fed. Reg. 702 (1944) (J.A. 350, n.6). As the number of qualified license applicants grew, the Commission came, in choosing among competing candidates for the limited number of new stations, to prefer persons who did not own local newspapers, on the assumption that they were more likely to add to the diversity of viewpoints expressed in local media. *See Policy Statement on Comparative Broadcasting Hearings*, 1 F.C.C.2d 393, 394-95 (1965); J.A. 351-52 n.9. However, by its terms this pol-

icy did not affect the renewal of existing licenses.[6] The Commission has consistently renewed broadcast licenses held by newspaper owners if the licensee had not abused its common ownership and the station's performance otherwise served the public interest. Indeed, it has been clear from the outset that the Communications Act does not bar owners of newspapers from being licensees of broadcast stations (J.A. 192, ¶ 102).[7]

The instant rulemaking required almost five years to complete and generated a voluminous record. Based upon review of that record and its prior experience with cross-ownership problems, the Commission adopted a tripartite approach designed to regulate the speed of further diversification in the public interest. As in the First Report and Order, the Commission prohibited the formation of any new cross-ownerships in the future and required that existing combinations be dissolved in any future sale (J.A. 191, 192, ¶¶ 101, 103). It permitted existing cross-

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[6] 1 F.C.C.2d at 393 n.1; *see Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1207 (D.C. Cir. 1971); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[7] The question of newspaper-broadcast cross-ownership is also not unknown to the Congress, although it has never enacted legislation on the subject. Congress first inquired about the Commission's position as to newspaper cross-ownership in January 1937. *See* Legal Opinion of FCC General Counsel to the Senate Interstate Commerce Committee, filed Jan. 25, 1937 (*see* J.A. 445, 449). In 1945, the House Select Committee to Investigate the FCC discussed the results of the Commission's prior cross-ownership investigation. H.R. Rep. No. 2095, 78th Cong., 2d Sess. 17 (1945). In the late 1940s and early 1950s, Congress considered several bills which would have expressly prohibited the Commission from discriminating against newspapers in the granting of broadcast licenses. But Congress decided to forego action when testimony on behalf of the Commission persuaded it that legislation was unnecessary. *See* S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949). The problems of newspaper cross-owners also were aired to an extent in 1970-71, when Congress briefly contemplated legislation to reverse the decision in the *Greater Boston Television* case, *supra*, n.6.

ownerships to continue in communities which already enjoyed diversity of expression (J.A. 200-03, ¶¶ 112, 114). But in communities in which the Commission considered that an effective monopoly of communication existed, *i.e.*, one person owned both the only television station and the only newspaper, it ordered divestiture of one of the two media holdings within five years (J.A. 203-07, ¶¶ 112-114).

The Commission's decision was carefully tailored to accommodate the conflicting public interest considerations which emerged as it considered various aspects of the cross-ownership problem. In determining what the public interest required, the Commission's "primary concern [was] diversity in programming service . . ." (J.A. 200, ¶ 112). But it recognized that diversity "is not the only point to consider" and that "a number of [adverse] public interest consequences" would result from undue emphasis on that "abstract goal alone" (J.A. 197, ¶ 108).

Although the Commission found no pattern of misuse of commonly-owned media by newspaper cross-owners, it had little hesitation in adopting a prospective ban on formation of new combinations, because of the absence of countervailing public interest concerns (J.A. 191, 203, ¶¶ 101, 112). By the nature of a prospective ban, all affected parties are placed on notice and can plan accordingly. Thus, even though the Commission saw no urgent need for such action, it concluded that "[s]ince diversity can be fostered through prospective rules without the fundamental disruption that would occur with altering all current ownership patterns, even a [small] gain [in diversity] is worth pursuing" (J.A. 193, ¶ 104).

Relying in part on its finding that newspaper owners of broadcast stations have proved as a class to be exceptionally responsible licensees (J.A. 197-98, ¶ 109), the Commission decided to reject a policy of across-the-board divestiture for existing combinations. The Commission

found that, unlike a prospective rule, retrospective divestiture "introduces the possibility of disruption for the industry" and "losses or diminution of service to the public" (J.A. 198, 201-02, ¶¶ 109, 112). The Commission therefore concluded that "a mere hoped for gain in diversity" could not justify risking the occurrence of the potential adverse consequences (J.A. 198, ¶ 109; *see* J.A. 199, ¶ 110):

> There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding (J.A. 197, ¶ 108).

Accordingly, the Commission decided to compel divestiture of existing combinations only in markets where it appeared from the ownership structure that there was an absence of "real community-wide diversity on vital issues of local concern" (J.A. 203, ¶ 112). The Commission identified 16 communities in which the newspaper cross-owners faced no independently-owned mass media competition and thus enjoyed "an effective monopoly in the marketplace of ideas as well as economically" (*id.*). While characterizing divestiture as "a harsh remedy, one to be reserved only where [*sic*] the need is overwhelming and the evidence unambiguous," the Commission nevertheless concluded that existing combinations had to be dismantled in the "egregious cases" where there was no "effective juxtaposing of views" (J.A. 207, ¶ 114).

The Court of Appeals' Decision

The court of appeals acknowledged that the record was "essentially inconclusive" as to any negative effects on the public interest from existing newspaper-broadcast cross-ownership (J.A. 414) and that the Commission had based its divestiture decision "primarily on policy, not factual considerations" (J.A. 396 (footnote omitted)). The court found that the prospective ban on new combinations was rationally based on the Commission's diversification policy. While conceding that it was speculative whether broadening of ownership would actually increase diversity of speech, the court found that this uncertainty did not render the Commission's effort irrational (J.A. 373; *see id.* 426-27).

In reviewing the Commission's decision to grandfather existing combinations which did not enjoy a local monopoly, the court evaluated the policies and record presented on review and held "that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm [from existing combinations] before ordering divestiture" (*id.* 415-16). The court found that the Communications Act of 1934, *as amended*, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), the policies associated with the First Amendment, and the Commission's own diversification policy required a "presumption" in favor of divestiture absent a concrete factual showing of actual harm to the public interest (*id.* 415-18).* The court then considered and rejected

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* The court extracted this "presumption" almost entirely from the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (*see* J.A. 418 & n.93, *citing* J.A. 351-53 n.9.) This reliance on the 1965 Policy Statement overlooks the facts that (a) the function of the policy statement was to provide standards for selecting among *new applicants*, and it was expressly made inapplicable (and has never been applied, except as a guide to introduction of evidence) to cases involving incumbent licensees (1 F.C.C.2d at 393 n.1; *Citizens Communications Center* v. *FCC*, *supra*, 447 F.2d at 1208-09 n.23); (b) the Policy Statement provides cri-

each of the countervailing policies the Commission found important, dismissing them as "lesser policies, lacking support in the record" (*id.* 427). The court held that the Commission could not "rationally" have concluded that these competing policies justified grandfathering "absent a showing of actual harm" (J.A. 426).

On the basis of this holding, the court vacated the grandfather rule and remanded the record to the Commission for "adoption of a rule not inconsistent with" the court's conclusion "that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (J.A. 431).

ARGUMENT

The court of appeals' decision raises two principal issues which this brief will address: First, whether the court usurped the power delegated by Congress to the Commission in determining that conflicting public policies required general divestiture of co-located newspaper-broadcast combinations. Second, whether in any event the court exceeded its authority by remanding with instructions affording the Commission no alternative but to adopt rules requiring general divestiture.

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teria for making a comparative assessment, by hearing, of known applicants for a specific facility, and does not necessarily serve as an adequate guide, much less support a controlling "presumption," for comprehensive resolution of public interest questions in a rule-making of nationwide scope involving stations in hundreds of diverse markets; and (c) in any event, far from making media diversity a paramount consideration, the Policy Statement specifies the "first" goal of licensing proceedings to be obtaining "the best practicable service to the public," while "maximum diffusion of control of the media of mass communications" is relegated to the "second" objective. *See* 1 F.C.C.2d at 394.

I. The Court's Reversal of the Commission on the Question of Divestiture Exceeded the Proper Scope of the Court's Reviewing Authority

A. *The Court Applied An Incorrect and Inconsistent Standard of Review to the Divestiture Question.*

Under the Communications Act, Congress delegated to the Commission the legislative responsibility for giving content to the statutory standard that issuance of broadcast licenses shall serve the public convenience, interest or necessity.[9] The role of the courts in the substance of such legislative policy judgments is only "to correct errors of law" which the Commission may have made in reaching or articulating its judgment. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); K. Davis, *Administrative Law of the Seventies*, § 29.01 (1976).

Thus, in reviewing a Commission rulemaking, the court of appeals properly may determine only whether the agency's action was rational and based on a consideration of the relevant factors. Section 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). "The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra*, 401 U.S. at 416. Especially where, as in the instant case, the agency's decision is based on an assessment of competing public policy considerations, its judgment is "entitled to the greatest amount of weight by appellate courts." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). *See Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *see generally Udall* v. *Tallman*, 380 U.S. 1 (1965).

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[9] *See* 47 U.S.C. §§ 303(r), 307(a); *see also id.*, §§ 154(i), 309(a); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

The court of appeals' eagerness to impose its own policy views on the final outcome of the Commission's rulemaking proceeding is sharply reflected in the court's discussion of the applicable standard of judicial review. As to the prospective ban on cross-ownerships, with which the court quite evidently agreed, the court was content to apply restrainedly the traditional standards applicable to informal rulemaking—namely, whether the Commission's determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and whether it had a "rational basis" (J.A. 364-65; *see id.* 365-74). As to the Commission's grandfathering determination, on the other hand, the court stated that, while "technically" there is "no requirement that the rules be based on substantial evidence," nevertheless this aspect of the Commission's decision must be "supported by the record" (J.A. 394-95).

The court, recognizing the inconsistency, attempted to justify it solely by the suggestion that the Commission's decision on divestiture was somehow more "factual" and thus less policymaking in nature than the determination to adopt a prospective ban:

> With respect to the prospective rules, which reflect a legislative type policy judgment, *as opposed to the retroactive rules*, which purport to be based also on factual considerations, our primary task will be to determine that the regulations are not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (J.A. 364-65) (emphasis added).

But in fact, the Commission's decision on divestiture was every bit as much a "legislative type policy judgment" as its adoption of prospective rules. Indeed, the court appeared to acknowledge this elsewhere in its opinion, stating that the Commission's decision against divestiture rested "primarily on policy, not factual considerations"

(J.A. 396).[10] In substituting its own views for those of the Commission on that policy judgment, the court clearly transgressed the bounds of its authority as a reviewing court.

B. *The Commission's Decision Not to Require General Divestiture Was Rationally Based And Well Within Its Authority.*

1. The Commission Rationally Weighed the Public Interest Consequences of Divestiture.

The Commission's decision to grandfather existing cross-ownerships in all but monopoly situations reflected a

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[10] If the court meant to suggest that the Commission's error lay in not basing its divestiture decision on a factual record of "hard" evidence, the court was not only being inconsistent with its treatment of the Commission's authority to adopt prospective rules, but it also misapprehended the procedural requirements applicable to the Commission proceeding and the nature of the court's review authority. Commission rulemaking under Section 303(r) of the Communications Act, 47 U.S.C. § 303(r), is informal rulemaking subject to Section 4 of the APA, 5 U.S.C. § 553, rather than adjudication or formal rulemaking governed by Sections 7 and 8, 5 U.S.C. §§ 556, 557. *California Citizens Band Ass'n* v. *United States*, 375 F.2d 43, 53-54 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967). Indeed, this Court long ago recognized the flexibility of informal rulemaking, as opposed to the rigidities of hearing—type proceedings, as one of the main justifications for use of such rulemaking to deal with industry-wide policy issues such as those involved in this case. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

In reviewing rulemaking such as that involved here, the court's function is not to "weigh the evidence introduced before the Commission," just as it is "not to inquire into the wisdom of the regulations" nor to inquire into the "soundness of the reasoning by which the Commission reaches its conclusions . . . [except] to ascertain that . . . [they] are rationally supported." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972); *cf. Camp* v. *Pitts*, 411 U.S. 138, 140-41 (1973); *see* 5 U.S.C. § 706(2)(E); *see also Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 415-16. This case is illustrative of an unfortunate tendency of some courts in recent years to apply a more intrusive standard of review to agency rulemaking and, in particular, to insist on formal record support for what are essentially legislative judgments in informal rulemaking. *See, e.g., Home Box Office, Inc.* v. *FCC*, D.C. Cir. No. 75-1280 (decided March 25, 1977), *cert. denied*, No. 76-1724, October 3, 1977, *petition for rehearing pending; National Nutritional Foods*

rational balancing of the conflicting public interest concerns. The Commission identified three adverse effects on the public interest that would result from forced divestiture: Loss of continuity of service by newspaper cross-owners as a group; loss of local ownership and operation; and potentially adverse economic consequences affecting the quality of programming. The Commission's opinion provides a reasoned path from these findings to its ultimate judgment, in the application of its expertise, that the potential disruption from across-the-board divestiture outweighed the speculative, marginal gains that might result in communities which already enjoyed diversity of media voices.

One of the Commission's primary concerns was that divestiture would deprive the public of the benefits of the stability and continuity of service provided by the newspaper cross-owners (J.A. 197, ¶ 108). The Commission's concern is supported by "the unassailable premise" that the past performance of a broadcaster is the most reliable indicator of its future performance. *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). The Commission found that newspaper cross-owners as a group have established "[t]raditions of service" in the public interest and have shown long-term continuity of ownership (J.A. 197-98, ¶ 109). The Commission thus had substantial assurances that newspaper owners would continue to provide a high level of public service in the future if divestiture were not ordered. But there could be no advance assurance that the licensees who would take their places after wholesale divestiture would render comparable services or demonstrate similar long-term commitment to broadcasting.[11]

Ass'n v. *Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *see id.* at 704-05 (concurring opinion); *Associated Industries* v. *Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (dictum).

[11] While its holding is not entirely clear, the court of appeals appears to have quarreled with the Commission's evaluation of the record on this point and the weight to be attached to these facts (J.A. 396-402). On the basis of its own weighing of the evidence, the court of appeals seems to have concluded that the record was "inconclusive" as to the benefits of newspaper owners as broadcast licensees (J.A. 413-14; *see* J.A. 413 n. 88). For the reasons discussed above, we believe that this reweighing of the evidence was an usurpation of the Commission's authority. *See United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*.

Furthermore, even if the Commission could be assured that the new group of licensees would be comparable in all respects to the newspaper cross-owners, it was properly concerned that divestiture would nonetheless inflict a substantial and immediate blow to the public interest. Continuity of service enables a broadcaster to develop familiarity with the needs of his community and expertise in meeting those needs. New licensees presumably would lack expertise and would require substantial periods of time fully to implement even their own preconceived proposals for broadcast services. The public interest might suffer during the licensee's learning period, and this cumulative deficit could never be recouped even if the new licensee eventually attained or exceeded the former level of service.[12] The court of appeals' opinion suggests no reason why the Commission was required to ignore these problems in ascertaining the public interest.[13]

In this connection, the court's opinion takes issue with the notion that the Commission in considering di-

[12] The court's insistence that a "one-time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity" (J.A. 422), wholly misses the point of this policy consideration, which focuses on the transition period.

[13] The court of appeals contended that it was irrational for the Commission to be concerned about disrupting continuity, since it routinely permits substantial license turnover by approving license assignments (J.A. 423). But the question whether the Commission should compel transfers by proven performers who desire to retain their licenses is a different question from whether the public interest is served by permitting transfers by licensees who have lost interest in rendering broadcast service.

vestiture could properly be concerned with the "legitimate renewal expectancies" of licensees, in reliance on existing policies. J.A. 422. The court correctly observed that the Communications Act negates any property right in use of the public airwaves, 47 U.S.C. § 301 (J.A. 422 & n.97). But to withhold such a property right is far from saying that there is no public interest in fulfilling the renewal expectations of qualified licensees. The Commission's policies have long given special recognition to the record of service of an incumbent licensee, in considering whether renewal of the existing license should be preferred to awarding it to a new applicant.[14] The court of appeals has acknowledged that recognition of "legitimate renewal expectancies" is "implicit in the structure of the [Communications] Act." *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 854. And while the court of appeals has disagreed with one Commission attempt to formulate and implement this policy,[15] it nevertheless has recognized that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC*, *supra*, 447 F.2d at 1213 n.35.

The Commission's second major concern was that the restructuring of the broadcast industry required by wholesale divestiture might lead to the sales of a significant number of stations to nonlocal interests (J.A. 197, ¶ 108). A great preponderance of existing newspaper cross-

[14] *See* Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951); *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970); Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 40 P&F Radio Reg.2d 763, 776 (1977), *petition for review pending sub nom. National Black Media Coalition* v. *FCC*, D.C. Cir. No. 77-1500.

[15] In the 1970 *Policy Statement*, *supra*.

ownerships are locally owned (J.A. 420-21).[16] In the event of divestiture, many of these stations might be sold to outside interests, due to the mobility of investment capital. To the extent that local owners are more responsive to local programming needs because of their familiarity with and greater ties to the service area, forced license transfers would sacrifice their expertise, to the public detriment.

Finally, the Commission was concerned that widespread divestiture would cause economic dislocation by disrupting the equity capital markets and increasing the interest rates payable on the large sums of money necessary to finance the transfer of these stations (J.A. 197, ¶ 108). The court of appeals dismissed this policy consideration in part because it evidently believed that the Commission's concern was solely with the private equities of the newspaper cross-owners in a forced sale situation (J.A. 424 & n.101). But the economic consequences of divestiture upon the quality of programming were certainly a factor which the Commission could properly consider to have a bearing on the public interest. *Cf. Carroll Broadcasting Co.* v. *FCC*, 258 F.2d 440 (D.C.Cir. 1958).

2. The Commission Was Not Legally Required to Depart From Its Normal Practice of Regulating Industry Ownership Patterns Prospectively.

The court's disparagement of the Commission's concern with disruption of the broadcast industry blinded it to a fourth major policy serving the public interest which is inherent in the Commission's approach and which argued against divestiture. The Commission's long-standing evolutionary approach to fostering diversity of media in-

[16] Not all cross-ownerships, of course, involve local ownership. But the Commission was nonetheless clearly entitled to take into account the overall, nationwide loss of localized ownership which would result from general divestiture.

terests is itself an important component of the public interest. The Commission's aversion to seeking global solutions, and its preference for a step-by-step approach building upon the wisdom of experience, is a rational solution to the problem of maintaining stability and a continued high level of service in the broadcast industry while moving gradually and predictably to promote the goal of diversity.

The Commission's rejection of retroactive divestiture rules is an essential element of this evolutionary approach. As the Commission observed (J.A. 137, ¶ 5), "[a]lthough not unprecedented, the idea of divestiture of ownership [is] a departure from the typical Commission approach of limiting any new rules to prospective effect." Thus, in announcing changes in policy, it has frequently grandfathered previously approved non-conforming arrangements or otherwise distinguished between prospective and retroactive applications.[17] In particular, the Commission has done so repeatedly in establishing new rules and policies to promote diversification of ownership.[18] Indeed, in its First Report and Order in this proceeding in 1970, the Commission, in restricting broadcast-

[17] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg. 1801, 1834-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

[18] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306 (1970).

ers essentially to one broadcast service in any community, did not require retroactive divestiture. And in many of those prior instances, the Commission expressly referred, as it did here, to the inherently disruptive consequences of divestiture.[19]

The Commission here rationally determined not to risk such disruptive consequences, in part on the basis of its anticipation that the new prospective ban on cross-ownerships could accelerate a process of attrition which was already reducing the size of the problem. As the Commission observed (J.A. 202, ¶ 112 n.29), the number of co-located newspaper-television combinations dropped from 94 in 1970 to 79 in July 1974. And after the rule-making record was closed, the number of co-located combinations was reduced to 65 by transfers of either newspapers or television stations; three additional applications to transfer television stations currently are pending before the Commission. Another 7 would be eliminated by its decision with respect to divestiture in the so-called "egregious" markets (*id.* at 242). Although attrition by itself might not eliminate all cross-ownerships quickly, the Commission's expert judgment that it can rely on license turnover constantly to reduce the size of the problem must be accorded substantial deference.

In opting for an evolutionary approach rather than forced divestiture, the Commission properly took account of a number of factors that serve to guard against any adverse consequences from those cross-ownerships that continue to exist. In the first place, the record revealed no pattern of abuse of common ownership or control of co-located broadcast stations and newspapers (*e.g.*, J.A.

[19] *E.g.*, Report on Chain Broadcasting (Order No. 37, Dkt. No. 5060) 67 (1941); Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 789 (1966); Diversification of Control of CATV Systems, 23 F.C.C. 2d 833, 835 (1970).

186, 200); it also reflected a substantial editorial and operational independence between co-owned press and broadcast outlets (J.A. 219, ¶ 131).[20] To the extent that the Commission might in the future find abuses or other harm to the public interest in individual cases, its policies are fully broad and flexible enough to enable it to deal with such cases in making the licensing and other determinations entrusted to it by the Communications Act.[21] In addition, the Commission has a number of rules and policies—including the fairness doctrine, and the statutory "equal time" and political candidate access requirements—specifically designed to ensure a multiplicity of viewpoints and compensate for any concentration in broadcast ownership or control. J.A. 164. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

At the root of the court of appeals' decision is a disagreement with the relative weight the Commission attaches to the policy of diversification and the measured, step-by-step manner in which it has acted to reach that end. Clearly, however, the Commission may proceed one step at a time, dealing by rule with those aspects of the problem that appear most urgent, and leaving other aspects for later resolution as necessary. *See Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). As this Court reaffirmed in *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974), "so long as the line drawn by the [government] is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." If the court of appeals' opinion is read as suggesting that the Commission was unwise and its grandfathering regulation unlikely to protect the interests in diversity the court cherishes, then the rejoinder is this Court's observation in *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 224, that the courts are "the wrong forum for such a plea. . . . It is not for us to say that the 'public interest' will be furthered or retarded by the [regulations]. The responsibility belongs to Congress for the grant of valid legislative authority and to the Commission for its exercise."

[20] The *Dallas-Times Herald* and Station KDFW-TV, while both under the ultimate control of *Amicus Curiae* Times Mirror, are held by different subsidiaries, and their editorial policies and operations are completely independent of each other.

[21] *See, e.g.*, Anthony Wayne Broadcasting, 19 F.C.C. 383 (1954), *remanded sub nom. Fleming* v. *FCC*, 225 F.2d 523 (1955); Carolinas Advertising, Inc., 42 F.C.C.2d 1027 (1973).

II. In Purporting to Deprive the Commission of All Discretion to Consider Alternative Courses of Action on Remand, the Court of Appeals Exceeded its Authority as a Reviewing Court.

In addition to rejecting the Commission's policy judgment in favor of its own, the court of appeals also erred in ordering the Commission to adopt a rule to require general divestiture and permitting it no latitude to take any other course on remand.

As this Court held in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), once the reviewing court has identified the legal error in the agency's action, it has "exhausted the only power which Congress gave it." The matter then must be remanded to the agency for reconsideration in light of the court's opinion.[22]

> It is a guiding principle of administrative law, long recognized by this Court, that an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. *NLRB* v. *Food Store Employees Union*, 417 U.S. 1, 9 (1974), *quoting FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145.

[22] *E.g.*, *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

A reviewing court lacks authority to write its views into a statute in the guise of scrutinizing an agency action for legal error.

Contrary to these principles, the court of appeals here itself determined precisely the rule the Commission should adopt on remand. It ordered the Commission to adopt a rule stating in effect that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (J.A. 431; *see* J.A. 442-43).[23] In foreclosing the Commission from the opportunity to determine what degree of divestiture was required, the court of appeals disregarded "the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 141.

The court's decision cannot be defended on the ground that the only questions left open on remand were so "crystal-clear [as to render] a remand an unnecessary formality." *NLRB* v. *Food Store Employees Union*, *supra*, 417 U.S. at 8. If its failure to impose divestiture retroactively were held irrational, the Commission would face very complex questions as to what the public interest required. It might rationally have decided that having no cross-ownership rule at all would be preferable to across-the-board divestiture. Similarly, if its selection of 16 monopoly cities for divestiture were irrational, the Commission might have determined to require divestiture in no markets, rather than in all markets, or to adopt some variant of the "percentage combination

[23] We do not read the ambiguous footnote at J.A. 393 n.53 as an indication that the Commission has any room for exercise of discretion on remand. The first two sentences of the footnote describe hypothetical situations that will not arise under the court's mandate, the effect of which is accurately summarized in the last sentence of the footnote.

of the market approach" suggested by Commissioner Robinson in dissent (J.A. 304). But, in any event, these matters would have called for exercise of agency expertise and should have been decided by the Commission in the first instance.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed insofar as it vacated the Commission's decision not to apply its rule retroactively to existing newspaper-broadcast combinations in communities served by other media voices.

Respectfully submitted,

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